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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 76-357

LINMARK ASSOCIATES, INC., et al.,

Petitioners,

vs.

THE TOWNSHIP OF WILLINGBORO, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

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BRIEF FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

Interest of *Amicus Curiae**

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist black persons to secure their constitutional rights by the prosecution of lawsuits. The Legal Defense Fund receives many requests for assistance in the enforcement of fair housing laws, and seeks to advance the national policy of "fair housing through the United States," 42 U.S.C. § 3601, in both federal and state courts.

Today integrated communities like Willingboro are beset with tensions and threat of instability created by "block-

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* Letters of consent to the filing of this brief from counsel for the petitioners and the respondents have been filed with the Clerk of the Court.

busting" which lead to racial segregation, damaging entire communities. The fair housing laws seek to prevent the harm done by blockbusting and sanction efforts by all levels of government to this end. Willingboro's effort to preserve integration and stability is an instance of such enforcement at the local level. Indeed, early attention by local authorities may be the best and perhaps only effective remedy for blockbusting; it may be impossible to reverse the processes of panic and resegregation once underway.

ARGUMENT

Introduction

Although *amicus'* position in this case is that the ordinance prohibiting for sale signs is a valid enactment, it must be emphasized that such may not always be the case. Under other circumstances such an ordinance may result in barring blacks from equal access to housing. For example, in an all-white community where realtors control the housing market, the only way prospective black purchasers may be able to find houses is to tour the area looking for "for sale" signs.

In short, no absolute rule that these ordinances either are or are not valid is possible. In each case, the courts must carefully weigh a variety of factors, including the state of integration of the community, the accessibility of housing through realtors or newspaper advertising, and the history of the enactment of the ordinance in question. As we shall show below, the proper result in this case is to uphold the ordinance. In doing so, we urge that the Court should provide guidance to the lower courts to assist them in striking a proper balance between two purposes of the Fair Housing Act; ensuring full access to housing, and preventing the destructive effects of blockbusting.

Summary of Argument

The standard for determining the constitutionality of the Willingboro ordinance banning "for sale" and "sold" signs on residential property must accommodate the State's obligation to protect the right of black citizens to equal access to housing and the right of all Americans to open integrated communities, guaranteed by the Thirteenth and Fourteenth Amendments. The proper inquiry is (1) does the ordinance have a segregative effect; and (2) was the ordinance enacted to prevent the destructive segregating effects of fear and panic selling rather than to exclude minorities from residing in the community; the appeals court determination that the Willingboro ordinance was adopted pursuant to the town's obligations under the Thirteenth Amendment and Equal Protection Clause of the Fourteenth Amendment is clearly correct. The ordinance neither had the effect of nor was it intended to create racial segregation. On the contrary, it preserves racial integration in Willingboro. From this perspective, the ordinance's restriction of commercial speech does not violate the First Amendment.

I.

The Willingboro Ordinance Enforces the Fair Housing Guarantee of the Thirteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment.

A. *The National Fair Housing Guarantee.*

The Commission on Civil Rights' most recent report on fair housing finds that "[s]evere residential segregation and isolation between races and ethnic groups is a marked feature of virtually every metropolitan area in which minorities reside," [1] and that when blacks move to suburban

[1] U.S. Commission on Civil Rights, *Twenty Years After Brown: Equal Opportunity in Housing* 119 (1975). See also *Linmark As-*

communities they frequently find themselves in black enclaves which border central city neighborhoods.[2] "[R]eal estate agents have abetted th[e] process of racial change by playing on white fears and prejudices and inducing panic selling by whites . . . in countless neighborhoods across the Nation." [3]

> "First, a sense of panic and urgency immediately grips the neighborhood and rumors circulate and recirculate about the extent of the intrusion (real or fancied), the effect on property values and the quality of education. Second, there are sales and rumors of sales, some true, some false. Third, the frenzied listing and sale of houses attracts real estate agents like flies to a leaking jug of honey. Fourth, even those owners who do not sell are sorely tempted as their neighbors move away, and hence those who remain are peculiarly vulnerable. Fifth, the names of successful agents are exchanged and recommended between homeowners and frequently the agents are called by the owners themselves, if not to make a listing then at least to get an up-to-date appraisal. Constant solicitation of listings goes on by all agents either by house-to-house calls and/or by mail and/or by telephone, to the point where owners and residents are driven almost to distraction." [4]

The real estate industry's use of "for sale" and "sold" signs is a critical ingredient in "panic selling" for such signs tend "no less than overt blockbusting practices, to undermine any hope of . . . [racial] stability. Once this

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sociates, Inc. v. *Township of Willingboro*, 535 F. 2d 786, 789 n. 1; *see also* U.S. Commission on Civil Rights, *Equal Opportunity in Suburbia* 64 (1974).

[2] *Id.*

[3] *Id.* at 9.

[4] *United States* v. *Mitchell*, 335 F. Supp. 1004, 1006 (N.D. Ga. 1971).

hope is lost and complete racial transformation appears inevitable, even those desiring to remain are virtually forced to sell." *Barrick Realty, Inc.* v. *City of Gary, Indiana*, 354 F. Supp. 126, 135 (N.D. Ind.), *aff'd*, 491 F. 2d 161 (7th Cir. 1974). Ordinances banning such signs "remove a significant source of panic selling pressure from those who wish to remain in the . . . neighborhood." 354 F. Supp. at 135.[5]

Congress has clearly aligned the Nation with the residents of Willingboro in §804(e) of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3604(e), which makes it unlawful "[f]or profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion or national origin." Legislative history indicates that Congress used the strongest language to condemn the effects of blockbusting in creating "new ghettos",[6] and recognized that the community suffered substantial injury from racially discriminatory housing practices, *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972).

Although Title VIII is "a detailed housing law, applicable to a broad range of discriminatory practices and

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[5] See *infra*.

[6] The antiblockbusting provision was introduced by Representative Bingham as an amendment to Title IV of the Civil Rights Act of 1966, the predecessor to Title VIII which passed the House but not the Senate, 112 Cong. Rec. 18177 (1966), in order to overcome the "two evil results" of realtor windfall profits and "creating in the end a new black ghetto." Blockbusting was described as "one of the most evil situations accompanying and causing and flowing from segregation in housing", *id.* at 18178. Senator Mondale, the foremost proponent of Title VIII, compared blockbusting to "profit[ing] by booking young people with drug addiction" and "stealing wheelchairs from crippled children; it is as bad as you can think of . . ." Hearings on S. 1358, S. 2114 and S. 2280 Before the Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking and Currency, 90th Cong. 1st Sess. at 118 (1967). See also 114 Cong. Rec. 2273, 2275, 2692-2696, 2704, 2992 (1968).

enforceable by a complete arsenal of federal authority,"[7] the coordinate enforcement role of state and local authorities is recognized and made part of the statute's enforcement scheme. § 815 of Title VIII, 42 U.S.C. § 3615, expressly provides that Title VIII is not meant to preempt any state or local antidiscrimination measure "that grants, guarantees, or protects the same rights as are granted by this Title." Although "the authority and responsibility for administering this Act shall be in the Secretary of Housing and Urban Development," the Secretary "shall consult with State and Local officials . . . .";[8] and Title VIII carefully integrates state and local enforcement authority into the very "arsenal of federal authority" in the enforcement provisions of Title VIII.[9]

Senator Mondale emphasized the need to supplement the increasing number of state and local government fair housing laws in introducing the Mondale-Brooke bill: "These scattered and local developments, far from absolving us from action, make it even more important than before that Congress enact a national fair housing law that will place all States and all localities upon an equal footing."[10] With respect to the antiblockbusting provision in § 804(e), 42 U.S.C. § 3604(e), legislative history is specific that antiblockbusting measures of state and local authorities, including, *"provisions . . . which go into the same thing"* are permitted and encouraged under the act.[11]

[7] *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 417 (1968).

[8] § 809, 42 U.S.C. § 3609; see also § 816, 42 U.S.C. § 3616.

[9] See §§ 810 and 812, 42 U.S.C. §§ 3610 and 3612.

[10] 114 Cong. Rec. 2277; compare 2273, 2274, 2992 and 9554. Senator Mondale echoed Attorney General Clark's comments in hearing.

> "This legislation . . . would not in any way interfere with State and local governments in their efforts to enforce their laws. On the contrary, it would be designed to encourage and vitalize those efforts. And it would provide for the Secretary of Housing and Urban Development to encourage and support state and local governments in the enforcement of their laws and in the conduct of their affairs under those laws."

Hearings on S. 1358, S. 2114 and S. 2280 Before the Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking and Currency, *supra*, p. 15.

B. *The Willingboro Ordinance.*

Willingboro Ordinance No. 5-1974 is a legislative measure consistent with Title VIII. The history of the town, the sequence of events preceding enactment of the ordinance, and its impact compel the conclusion that the purpose of the measure was to control incitement of racial fears and panic selling induced by realtors' use of "for sale" and "sold" signs. See *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, No. 75-616 (January 11, 1977), slip op. at 11-15.

After racial exclusion by the developer of Willingboro was enjoined,[12] the town committed itself to becoming racially integrated.[13] However, shortly before the passage of the ordinance, residents became increasingly preoccupied with racial problems and fears of resegregation. Concern was expressed that local newspapers had published articles about racial tensions, blockbusting, and an influx of blacks into the community.[14]

The Willingboro Human Relations Commission recommended the ordinance because investigations demonstrated that realtors' use of "for sale" and "sold" signs had induced widespread fear and panic selling.[15] Those recommendations were endorsed by organizations devoted

[11] 112 Cong. Rec. 18177 (colloquy between Rep. Bingham and Rep. Colmer). See Appendix A, State and Local Anti-Panic Selling Provisions.

[12] *Levitt and Sons, Inc.* v. *Division Against Discrimination in State Department of Education*, 31 N.J. 514, 158 A. 2d 177, *appeal dism.*, 363 U.S. 418 (1960).

[13] See discussion at 535 F. 2d 786, 789.

[14] Joint Appendix, pp. 51a, 96a.

[15] Joint Appendix, pp. 233a, 234a-336a (Gladfelter); 239a-240a, 244a (Porter); 247a-248a, 251a (Lyght).

to civil rights, including the N.A.A.C.P.[16] At public hearings held by the Township Council to consider the ordinance, "[c]omplaints were stated regarding phone calls, letters and house-to-house solicitations by realtors inquiring whether the home owner wishes to sell;[17] about panic selling;[18] about 'sold' signs remaining up for six weeks in violation of an ordinance requiring their removal in five days (in response to which Council members cited the great difficulty of enforcement);[19] about the 'forest' of signs, which created the impression 'that there was something wrong with the community',[20] and consequent departure of persons who might otherwise have remained."[21] 535 F.2d at 791.

After two years of investigation, the Township Council enacted the ordinance. We submit that the *record* is crucial to resolution of this case and there is no evidence in the record to support the claim that the impact of the ordinance has been to discriminate against black home purchasers. And, of course, segregation is not its purpose. Indeed, the purpose was the opposite—maintenance of integration. Real estate agents testified at trial that sales had not diminished.[22] Willingboro public school enrollment statistics, which the court may judicially notice, show that the absolute number of black students has continued to increase

[16] 535 F. 2d at 793-794, n. 6. At the hearing, community residents were proponents of the ordinance while the real estate industry was its major opponent.

[17] See, *e.g.*, Joint Appendix, pp. 46a, 100a-101a.

[18] See, *e.g.*, Joint Appendix, p. 102a; see also pp. 158a, 162a-163a.

[19] See, *e.g.*, Joint Appendix, pp. 34a-35a, 39a, 85a, 89a, 90a, 93a-94a, 109a.

[20] See, *e.g.*, Joint Appendix, pp. 44a-45a, 63a-64a, 71a, 90a, 92a, 93a, 105a, 113a-114a.

[21] See, *e.g.*, Joint Appendix, p. 102a. Blockbusting was also raised. See *id.* at 96a, 111a; see also 158a.

[22] Joint Appendix, p. 163a.

after enactment of the ordinance, both systemwide and in almost every school.[23]

That the ordinance was enacted to prevent panic selling does not mean that an identical ordinance might not be passed elsewhere in order to exclude blacks or to have that effect. However, Willingboro is not a community which has no black residents, the ordinance was *not* passed in response to the entry of the first black family or families into the community, nor has the impact been to exclude black homeseekers from living in the township.[24] No facts which would support a finding of unconstitutionality under the Thirteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment are present here. In the absence of such a finding, "a State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial . . . prejudice to another's hurt."[25] To use the First and Fourteenth Amendments "as a sword against such State power would surely stultify"[26] the national open housing policy.

[23] Brief For Respondent, Exhibit A.

[24] Compare discussion concerning Medford Lakes at 535 F. 2d at 803 n. 27, 811.

[25] *Railway Mail Assoc.* v. *Corsi*, 326 U.S. 88, 98 (1945) (Mr. Justice Frankfurter concurring).

[26] *Id.*

II.

The Willingboro Ordinance Is an Appropriate Means of Thwarting Panic Selling to Preserve an Integrated Community and Does Not Offend the First Amendment.

Unlike political and ideological dialogue, the posting of "for sale" signs is commercial product advertising which does "no more than propose a commercial transaction," *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376, 385 (1973).[27] This Court has consistently recognized that significant distinctions between commercial advertising and other types of speech support the need for differences in the degree and type of permissible regulation in each category. *Virginia State Board of Pharmacy* v. *Virginia Citizen's Consumer Council*, 425 U.S. 748 (1976); *Bigelow* v. *Commonwealth of Virginia*, 421 U.S. 809 (1975).

Moreover, unlike the statute in *Pittsburgh Press*, the Willingboro ordinance does not ban all advertisement of homes which are for sale, but rather allows such advertising by all means other than the posting of "for sale" signs on residential property. The fear expressed in *Virginia Board of Pharmacy* that a commercial message will not reach consumers is substantially weakened where the regulation only encompasses one of many channels of communication.[28] Indeed, at the trial which occurred nine

[27] The advertising here is distinguishable from the advertisement in *Bigelow* v. *Virginia*, *supra*, which announced the availability of legal abortions in New York and "contained factual material of clear 'public interest'". *Id.* at 822, or from other types of commercial advertisements which contain public interest elements. See *Virginia Pharmacy Board* v. *Virginia Citizens' Consumer Council*, *supra*, 425 U.S. at 760-761 and cases cited therein.

[28] Prior to the enactment of the ordinance, the real estate industry advertised by word of mouth and by newspaper advertisements. The majority of its business came from these sources, not from signs. Joint Appendix, pp. 33a, 36a.

months after the ordinance was passed and "for sale" signs had disappeared from Willingboro, witnesses testified that sales of homes had not diminished. Thus, as the Court noted in *Young* v. *American Mini Theatres*, "[v]iewed as an entirety, the market for the commodity is essentially unrestricted," —— U.S. ——, 49 L.Ed. 310, 321 (1976).

The analysis of the protection accorded commercial speech under the First Amendment has involved a careful balancing of the interests in each case. The interest of a community in protecting a seldom-achieved racial integration and in preventing the destructive segregating effects of a panic selling and blockbusting clearly outweighs the desire of real estate brokers to advertise by one particular method.[29]

[29] Suggestions in the briefs of petitioners and the American Civil Liberties Union as *amicus curiae* that the proper standard of review is the "clear and present danger" test or a "substantial governmental interest" test find no support in the Court's opinions.

The clear and present danger test, most recently refined in *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), was formulated in cases arising under criminal syndicalism statutes which sought to punish on the basis of an individual's political beliefs. Because the freedom to possess such beliefs forms the core of First Amendment values, the principle emerged that "[t]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite such action." *Id.* at 447.

Nor is the rigid application of a "substantial governmental interest" test warranted. The touchstone of this Court's opinions in the commercial speech area has been flexibility; the varying types of commercial speech necessitate a separate consideration of all issues in each case. For example, as the Court noted, some advertisements contain "factual material of clear 'public interest'." Compare *Bigelow* v. *Virginia*, *supra*, 421 U.S. at 822 with *Pittsburgh Press Co.* v. *Pittsburgh Commission on Hum. Rel.*, *supra*. The burden of justifying regulation of the former may well have to be greater than the burden of justifying restriction on the latter, since "[t]he question whether speech is, or is not, protected by the First Amendment often depends on the context of the speech" and "[e]ven within the area of protected speech, a difference in context may require a different governmental response." *Young* v. *American Mini Theatres*, *supra*, 49 L. Ed. 2d at 323, 324.

A. *The Ban on "For Sale" and "Sold" Signs Is Closely Related to Illegal Discrimination in Housing.*

The question of "the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit" was explicitly left open in *Bigelow* v. *Virginia, supra,* 421 U.S. at 825. This Court observed, *id.* at 825, n. 10:

> "We have no occasion, therefore, to comment on decisions of lower courts concerning regulation of advertising in readily distinguishable fact situations. Wholly apart from the respective rationales that may have been developed by the courts in those cases, their results are not inconsistent with our holding here. In those cases there usually existed a clear relationship between the advertising in question and an activity that the government was legitimately regulating. See, *e.g., United States* v. *Bob Lawrence Realty, Inc.,* 474 F.2d 115, 121 (CA5), *cert. denied,* 414 U.S. 826, 38 L. Ed. 2d 59, 94 S. Ct. 131 (1973). *Rockville Reminder, Inc.* v. *United States Postal Service,* 480 F. 2d 4 (CA2 1973); *United States* v. *Hunter,* 459 F. 2d 205 (CA4), *cert. denied,* 409 U.S. 934, 34 L. Ed. 2d 189, 93 S. Ct. 235 (1972)."

The ban on "for sale" signs is not only related to, but specifically directed against, panic selling prohibited by the Fair Housing Title of the Civil Rights Act of 1968, 42 U.S.C. § 3604. *United States* v. *Bob Lawrence Realty, supra,* one of the cases cited in *Bigelow,* upheld the constitutionality of § 3604(e) of the Fair Housing Title, which forbids blockbusting.

> "Congress was aware that as laudable and necessary as the profit motive might be for our socio-economic system, it must on occasion yield to more humane and compassionate mores which are inherent in the system itself, and necessary for survival." [30]

The court in another case cited in *Bigelow* rejected a First Amendment challenge to the Fair Housing Title's proscription against discriminatory advertising, § 804(c), 42 U.S.C. § 3604(c). *United States* v. *Hunter, supra.*

Because of their success at manipulating racial fears, blockbusting practices ". . . constitute a fundamental element in the perpetration of segregated neighborhoods, racial ghettos and the concomitant evils which have been universally recognized to emanate therefrom."[31] The widespread posting of "for sale" signs is as intimately related as any other tactic of blockbusting to aggravation of racial hysteria, and setting in motion panic selling and resegregation in communities.

In *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations, supra,* a prohibition on publishing employment advertisements in sex-designated columns was challenged on First Amendment grounds. In upholding the prohibition, this Court stated:

> "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." [32]

The justification for the regulation lay not in the fact that the advertising explicitly violated a federal or local law,

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[30] *Id.,* 474 F. 2d at 119.

[31] *Brown* v. *State Realty Co.,* 304 F. Supp. 1236, 1240 (N.D. Ga. 1969).

[32] 413 U.S. at 389.

but rather it "signaled that the advertisers were likely to show an illegal sex preference in their hiring decisions." *Id.* So, too, the prevalence of "for sale" signs signals the incitement of racial panic inimical to the existence of "truly integrated and balanced living patterns," *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (1972) which the Fair Housing Title seeks to achieve.[33]

B. *The Proliferation of "For Sale" and "Sold" Signs in a Racially Tense Community Broadcasts a Threatening and Deceptive Message.*

In *Virginia Pharmacy Bd.* v. *Virginia Citizen's Consumer Council, supra,* 425 U.S. at 771, this Court stated: "We see no obstacle to a state dealing effectively" with the problem of "commercial speech [which] is not probably false, or even wholly false, but only deceptive or misleading." Such regulation is not uncommon. Where the potential for deception exists, this Court has consistently sustained prohibitions on advertising by certain professions. *Head* v. *Board of Examiners,* 374 U.S. 424 (1960) (optometrists); *Williamson* v. *Lee Optical,* 348 U.S. 483 (1958) (eyeglass frames); see *Virginia Pharmacy Bd.* v. *Virginia Citizen's Consumer Council, supra,* 425 U.S. at 773, n. 25. The power of the Federal Trade Commission to prohibit misleading as well as false statements in labeling and advertising "has long been recognized," *Young* v. *American Mini Theatres, supra,* 49 L. Ed. 2d at 328, n. 31,[34] and the authority of the Securities and Exchange Commission to regulate information disclosed in stock solicitations is

[33] See, *e.g., Barrick Realty, Inc.* v. *City of Gary, Indiana, supra,* 354 F. Supp. at 135; *United States* v. *Bob Lawrence Realty, supra; United States* v. *Mitchell,* 335 F. Supp. 1004, 1006 (N.D. Ga. 1971); *United States* v. *Mintzes,* 304 F. Supp. 1305 (D. Md. 1969); *Zuch* v. *Hussey,* 394 F. Supp. 1028, 1033, n. 7 (E.D. Mich. 1975).

[34] See, e.g., *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608 (1946); *Donaldson* v. *Read Magazine, Inc.,* 333 U.S. 178 189 (1948); *National Commission on Egg Nutrition* v. *FTC,* 517 F. 2d 485 (7th Cir. 1975); *E. F. Drew & Co.* v. *FTC,* 235 F. 2d 735, 740 (2d Cir. 1956).

settled, *United States* v. *Re,* 336 F. 2d 306 (2d Cir.), *cert. denied,* 370 U.S. 904 (1964). And while there is a challenge to laws barring advertising by, for example, lawyers, there seems to be no serious claim that such advertising may be conducted totally unrestrained as to time, place and manner.

"For sale" signs are obviously not literally false advertising when placed in front of houses currently on the market.[35] However, regulation is permissible to prevent the more subtle but often graver evils caused by messages which, although literally true, convey underlying illegal or antisocial meanings. For example, to determine whether an advertisement is deceptive or misleading and subject to regulation or prohibition, the FTC employs a standard that is based not on proof of actual falsehood but on the "capacity to deceive" the typical audience which will receive the message. See, *e.g., Charles of the Ritz Distribs. Corp.* v. *FTC,* 143 F.2d 676, 680 (2d Cir. 1944); Note, *Development in the Law—Deceptive Advertising,* 80 HARV. L. REV., 1005, 1040, *et seq.* (1970).

That whether a message is deceptive depends on the particular context in which it is delivered is also clear in the area of labor relations. In *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575, 619 (1969), the question whether an employer's statements were misleading or coercive and, as a result an unfair labor practice, turned not on the literal language of the speech but "on the question: "[W]hat did the speaker intend and the listener understand?" In *Gissel,* this Court reasoned that:

> ". . . any balancing [of the employer's right of free speech against the employees' right to associate] must

[35] They became false, however, if allowed to remain in front of property that has been sold, a practice prevalent in Willington prior to the enactment of the ordinance. Joint Appendix, p. 38a. Signs often remained up for weeks after houses were sold. Joint Appendix, p. 34a.

take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications that might be more readily dismissed by a more disinterested ear." *Id.* at 617.

"[T]he understood impact" of "for sale" signs can only be viewed in the context of the racial tensions in suburban communities, the various uses for which real estate brokers employ "for sale" signs, and the actual reactions of the Willingboro residents to the practices of the real estate industry.[36] Within this context, "for sale" signs convey not merely a notice of available housing, but a threat to white homeowners which preys on their racial fears, induces panic selling, fosters blockbusting and invites resegregation.

C. *"For Sale" and "Sold" Signs Are Thrust Upon a Captive Audience.*

As destructive as the message conveyed by the "for sale" signs is, the continual bombardment of the message on the public is impossible to avoid.[37] Given the community's physical layout, a drive through any residential section of Willingboro would subject a person to a "forest" of signs.

This Court has recognized that "restrictions have been upheld . . . when the degree of captivity makes it impractical for the . . . viewer . . . to avoid exposure," *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 (1976). Mr. Justice Douglas stated, "[w]hile petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it," *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Mr. Justice Douglas, concurring).

[36] See *supra*, Point I.

[37] As the Court of Appeals observed, Willingboro dwellings were built in a line, as is typical of Levitt developments, with each house placed the same distance from the street on lots having 60-70 foot street footage.

The Willingboro ordinance in no way restricts the placement of "for sale" advertisements in newspapers; it does not prevent word of mouth or other dissemination. It only restricts display signs. As Mr. Justice Brandeis stated for a unanimous court in *Packer Corp.* v. *Utah*, 285 U.S. 105, 110 (1932):

> ". . . [T]here is a difference which justifies the classification between display advertising and that in periodicals or newspapers . . . Advertisements of this sort are constantly before the eyes of observers on the streets . . . without the exercise of choice or violation on their part . . . In the case of newspapers and magazines, there must be some seeking by one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or . . . streetcar placard."

And, just like those for whom a public transit system is the necessary mode of transportation, the residents of suburban Willingboro use the streets, "as a matter of necessity, not of choice." *Public Utilities Comm'n.* v. *Pollock*, 343 U.S. 451, 468 (1952) (Mr. Justice Douglas, dissenting), *cited with approval in Lehman* v. *City of Shaker Heights, supra*, 418 U.S. at 302.

Regulation of billboards on streets is not unprecedented. A state statute may permit highway billboards to advertise businesses located in the neighborhood, but not elsewhere. *Markham Advertising Co.* v. *State*, 73 Wash. 2d 405, 439 P.2d 248, *appeal dism.*, 393 U.S. 316 (1969). The Highway Beautification Act of 1965, 23 USC § 131, 23 U.S.C.A. § 131, authorizes states to adopt regulations which may significantly curtail use of such signs. If concern for aesthetics warrants regulation of placard advertisements, the national

goal of open housing and prohibition of blockbusting demand no less. Exposure to "for sale" and "sold" signs is of a qualitatively different nature than the exposure to the offending jacket in *Cohen* v. *California*, 403 U.S. 15, 21 (1969), where the public could "effectively avoid further bombardment of their sensibilities simply by averting their eyes." The ordinance's restriction of "for sale" signs is a justifiable method of preventing the use of the signs' deliberate "[visual] assault" on the public as a tool in panic selling.[38]

CONCLUSION

For the foregoing reasons, *amicus curiae* urges the Court to affirm the judgment of the appeals court.

Respectfully submitted,

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[38] *Rosenfeld* v. *New Jersey*, 408 U.S. 901, 906 (1972) (Mr. Justice Powell, dissenting), *quoted with approval in Erznoznik* v. *City of Jacksonville, supra*, 422 U.S. at 210 n. 6.

APPENDIX

APPENDIX A

State and Local Anti-Panic Selling Provisions

Before and since passage § 804(e) of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3604(e), states and localities have enacted a variety of measures to counter blockbusting or panic selling by attacking different aspects of the process. Title VIII's approach of banning, *inter alia,* representations regarding the entry into the neighborhood of persons of a particular race or color made for profit, in fact, is based on laws in effect in Ohio and Maryland.[1] With respect to such laws, several states expressly prohibit indirect as well as direct reference to neighborhood transition,[2] some specify the kind of representations prohibited,[3] and some do not limit representations only to those made "for profit."[4] Some states and localities provide compen-

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[1] 112 Cong. Rec. 18177 (Rep. Bingham), see *e.g.,* Md. Ann. Code Art. 56, § 230A (1968); Ohio Rev. Code Ann. § 4112.02 (Supp. 1970); Minn. Stat. Ann. § 363.03(2) (4) (Supp. 1971); *Chicago Real Estate Board* v. *City of Chicago,* 36 Ill. 2d 530, 533-534, 224 N.E. 2d 793, 797 (1967).

[2] See, *e.g.,* Mich. Stat. Ann. § 26.1300 (203) (1970).

[3] See *supra,* n. 1. Representative Bingham's original amendment to H.R. 14765 specifically prohibited the following representatives: "lowering of real estate values in the area concerned," "deterioration in the character of the area concerned," "an increase in criminal or anti-social behavior in the area concerned," and "a decline in the quality of the schools or other public facilities serving the area." See 112 Cong. Rec. 18179-18180.

[4] See, *e.g.,* Ill. Am. Stat. ch. 38, § 70-51(b)-(c) (Smith-Hurd Supp. 1971); Md. Ann. Code art. 56, § 230A (Supp. 1970); Ohio Rev. Code Ann. § 4112.02 (H) (9) (1970); Wis. Stat. Ann. § 101.60(2m) (Supp. 1971); Annapolis, Md. City Code § 8-3(a) (5) (1970); Buffalo, N.J., Ordinance § 350 (1970); Detroit, Mich., Code § 39-1-13.1 (1970); Evanston, Ill, Code § 25-½-6 (1970); Green Bay, Wis., Code of Gen. Ordinances ch. 32.05 (1968); Oklahoma City, Okla. Ordinance 11,848 (1969); Teaneck, N.J. Ordinance 1274 (1966).

satory relief such as damages,[5] while others specify injunctive relief,[6] criminal sanction,[7] or license revokation.[8] Other statutes or ordinances prohibit door-to-door solicitation made without the consent of the homeowner[9] or suspend solicitation for a period where blockbusting is threatened.[10] Other provisions prohibit incitement, harrassment, intimidation, threats or other conduct that induces panic selling.[11]

"Local ordinances have been passed to eliminate one of the blockbuster's major weapons by regulating the size and location of 'for sale' signs so as to limit their capacity to induce panic." [12] Some localities limit the time a 'for

[5] See, *e.g.*, N.Y. Exec. Law § 297 (McKinney Supp. 1970).

[6] See, *e.g.*, Kan. Stat. Ann. § 44-1022 (Supp. 1971); N.Y. Exec. Law § 297(6) (McKinney Supp. 1970); Alexandria, Va. Code § 17A-4 (1969); Green Bay, Wisc., Code of Gen. Ordinances ch. 32.05 (1968).

[7] See, *e.g.*, Md. Ann. Code at art. 56, § 230A (1968); Wis. Stat. Ann. § 101.60(6) (Supp. 1971); Mich. Stat. Ann. § 26.1300 412 (1970).

[8] See, *e.g.*, Conn. Gen. Stat. Ann. §§ 20-320(11), -328 (1969); D.C. Code Ann. § 45-1403 (1967); N.Y. Exec. Law § 296(3) (McKinney Supp. 1969).

[9] See, *e.g.*, *Summer* v. *Township of Teaneck*, 53 N.J. 548, 251 A.2d 761 (1969) (Teaneck ordinance requiring permit upheld); *cf. Breard* v. *City of Alexandria*, 341 U.S. 622 (1951).

[10] Dayton Ordinances, §§ 115-e (k), & 115-k; New York City Admin. Code, ch. 1, Title C, C1-1.0 *et seq.*; see Blockbusting A Novel Statutory Approach To An Increasingly Serious Problem, 7 Colum. J. L. & So. Prob. 538 (1971).

[11] Buffalo, N.Y., Ordinance ch. VII, art. XVIII, § 351(a) (1970); Pa. Real Estate Comm'n Regulations 15.9, 15.10, September 22, 1966; Ill. Ann. Stat. ch. 38, § 70-51(c) (Smith-Hurd Supp. 1971); Annapolis, Md. Code § 8-3(a) (5) (b) (1970).

[12] Comment, Blockbusting, 50 Geo. L. J. 170, 173 (1970); see, *e.g.*, Detroit, Mich. Ordinance 753-F, *reprinted in* 7 Race Rel. L. Rptr. 1256 (1962); Teaneck N.J., Ordinance 1157, *reprinted in* 7 Race Rel. L. Rptr. 1262 (1962).

sale' or 'sold' sign may be posted. Willingboro, for instance, before prohibiting signs altogether had a provision regulating the size, restricting its placement within property lines, and requiring that "[s]uch signs shall be removed within five days after the execution of any lease, rental agreement or agreement of sale for the premises in question by the occupant of the premises and/or the owner of the sign." [13] It was widespread abuse of this ordinance by realtors[14] that led the Willingboro Township Council to enact Ordinance No. 5-1974[15] which repealed the prior ordinance. Prohibition of "for sale" and "sold" signs is an approach adopted by other local authorities as well.[16] Indeed, trial testimony indicates that Willingboro "contacted National Neighbors and found out that there were some other communities throughout the country that have done this type of ordinance," [17] and then contacted one, Shaker Heights, Ohio.[18]

[13] Willingboro, N.J. Ordinance Chap. XVIII, § 17-6.5, *reprinted in* Joint Appendix, p. 14a.

[14] See, *supra*, p. 8, n. 19.

[15] Joint Appendix, p. 27a.

[16] See, *e.g.*, *Barrick Realty Inc.* v. *City of Gary*, 354 F. Supp. 126 (N.D. Ind. 1973), affirmed, 491 F.2d 161 (7th Cir. 1974) (Gary, Ind. Ordinance No. 4685 upheld); Chicago, Ill. Mun. Code, Ch. 198.7B and Ch. 113-28; Milwaukee Code of Ord. §16.3 (14.1) (limited to licensed real estate brokers and salesmen).

[17] Joint Appendix, p. 184a.

[18] *Id.* at 184a-185a.